

BEFORE THE SHORELINES HEARINGS
STATE OF WASHINGTON

SAVE A VALUABLE ENVIRONMENT)	
(SAVE) and State of Washington)	
DEPARTMENT OF ECOLOGY,)	SHB No. 90-85 & 87
)	
Appellants,)	
)	ORDER DENYING
v.)	MOTIONS FOR
)	PARTIAL SUMMARY
CITY OF BOTHELL and RICHARD)	JUDGMENT
TRULY,)	
)	
Respondents.)	
)	

I. INTRODUCTION

In December 1990, SAVE a Valuable Environment (SAVE) and the Department of Ecology (Ecology) filed appeals with the Shorelines Hearings Board (Board), contesting the City of Bothell's issuance of a shoreline substantial development permit to Richard Truly (Truly) to raise the height, width and length of berms along both sides of North Creek. On January 29, 1991, following a pre-hearing conference, the Board entered a Pre-Hearing Order listing 19 issues. In October 1991, Truly filed Motions to Dismiss¹ the following issues:

No. 2: Has there been piecemeal development by the issuance of the permit in violation of RCW 90.58.020?

No. 4: Did the City of Bothell follow proper SEPA procedures as outlined in WAC 197-11-630 and WAC 197-11-635 for adopting other SEPA documents or incorporating other documents by reference?

¹The Motion to dismiss was treated as a Motion for Partial Summary Judgment since affidavits and exhibits were presented and considered. See CR 12(b); Sims v. KIRO, Inc., 20 Wn. App. 229, 233, 580 P.2d 642 (1978).

1 No. 5: Whether the MDNs and checklist are inadequate and misleading
2 because:

3 a. It does not identify the "associated wetlands" on site and propose
4 appropriate mitigation for significant loss of wetland functions or
5 acreage;

6 b. It does not discuss and propose mitigation for loss of significant flood
7 storage;

8 c. It does not mitigate for significant negative impacts to the fish
9 habit[at] and resources in North Creek;

10 d. It does not identify the ultimate intended use of the property which
11 would have significant adverse impact on north Creek and associated
12 wetlands?

13 Respondent City of Bothell joined in the Motions.

14 The Board heard oral argument on December 10, 1991. The Board Members present
15 were: Attorney Member Judith A. Bendor, presiding, Chairman Harold S. Zimmerman,
16 Annette S. McGee, Nancy Burnett, Peter Hurley, and Judith Barbour. The argument was
17 taken by Court Reporter Randi R. Hamilton of Gene Barker & Associates (Olympia). The
18 Board reviewed and considered the following specific documents:

- 19 1. Motion to Dismiss and Supporting Memorandum filed October 23, 1991;
- 20 2. Declaration of Richard H. Truly filed on October 23, 1991;
- 21 3. State of Washington, Department of Ecology's Memorandum in Opposition to
22 Motion to Dismiss filed November 2, 1991;
- 23 4. Affidavit of Thomas Mark filed November 2, 1991;
- 24 5. Affidavit of Alan Wald filed November 2, 1991;
- 25 6. Affidavit of Michelle Stevens filed November 2, 1991;

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2 7. Appellant SAVE's Response in Opposition to Motion to Dismiss filed November 2,
3 1991;

4 8. Respondent Truly's Memorandum in Rebuttal filed November 12, 1991; and

5 9. For respondents certified Statement of Attorney Brian E. Lawler filed
6 November 12, 1991.

7 Following oral argument, and having deliberated, the Board made an oral
8 announcement denying the motions, and directed prevailing party Ecology to file a proposed
9 Order. This was done. The Board reviewed the proposed Order, revised as appropriate, and
10 now issues this decision and Order.

11 II. DECISION

12 Summary Judgment is only appropriate where the pleadings, affidavits, depositions,
13 and admissions demonstrate that there is no genuine issue as to any material fact, and the
14 moving party is entitled to judgment as a matter of law. CR 56(c). The evidence and all
15 reasonable inferences are to be considered in the light most favorable to the nonmoving party,
16 in this case Ecology and SAVE. Del Guzzi Construction Co. v. Global Northwest Limited,
17 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

18 A. Piecemeal Issue

19 The purpose of summary judgment is to avoid a useless trial because no material issues
20 of fact need to be determined. In this case, the Affidavits of Thomas Mark, Alan Wald, and
21 Michelle Stevens raise specific and material issues of fact which make a trial of this case
22 necessary to determine the piecemeal issue. The Affidavits place at issue whether the proposal
23 to raise the extend the berms is necessary for Mr. Truly to make agricultural use of his
24 property. The Affidavits also raise the issues as to whether the project will impact wetlands on
25 the property and whether the project is consistent with Mr. Truly's future plans to develop his

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2 property as a commercial site. In sum, the Motion to Dismiss Ecology's piecemeal claim is
3 denied because a trial is necessary to determine and resolve the factual disputes between the
4 parties underlying that claim.

5 **B. State Environmental Policy Act (SEPA) Issues**

6 **1. Ecology**

7 In support of dismissing Ecology's SEPA claims, Truly contends: (1) Ecology failed to
8 exhaust administrative remedies by not using the City's internal SEPA appeal process prior to
9 Ecology's Request for Review before the Shorelines Hearings Board, (2) failed to state during
10 the SEPA comment period that the mitigated DNS was improper, and (3) failed to raise SEPA
11 as an issue in the appeal notice filed with the Board.

12 In cases involving the Shoreline Management Act, SEPA overlays the shoreline permit
review process. Polygon v. Seattle, 90 Wn.2d 59 (1978). As the SEPA statute makes clear,
14 SEPA does not create an independent cause of action:

15 (1) Because a major purpose of this chapter is to combine environmental
16 considerations with public decision, any appeal brought under this chapter shall be
17 linked to a specific governmental action. The State Environmental Policy Act provides
18 a basis for challenging whether governmental action is in compliance with the
19 substantive and procedural provisions of this chapter. The State Environmental Policy
Act is not intended to create a cause of action unrelated to a specific governmental
action.

20 RCW 43.21C.075.

21 The statute further states in subsection 2:

22 (2) Unless otherwise provided by this section:

23 (a) Appeals under this chapter shall be of the governmental action together with
24 its accompanying environmental determinations.

1 (b) Appeals of environmental determinations made (or lacking) under this
2 chapter shall be commenced within the time required to appeal the governmental
3 action which is subject to environmental review.

4 RCW 43.21C.075.

5 The State Environmental Policy Act recognizes a different way for handling
6 SEPA claims in Chapt. 90.58 RCW, Shoreline Management Act cases, than all other matters:

7 Except for permits and variances issued pursuant to chapter 90.58 RCW, when
8 such a governmental action, not requiring a legislative decision, is conditioned or
9 denied by a nonelected official of a local government agency, the decision shall be
10 appealable to the legislative authority of the acting local government agency unless that
11 legislative authority formally eliminates such appeals.

12 RCW 43.21C.060.

13 For shoreline cases, the statute in effect recognizes the separate Shorelines Hearings
14 Board process which hears shoreline cases de novo. This separate, independent, statewide
15 Board does not exist for the land use cases cited by movant Truly. In such land use cases,
16 appeals from local decisions, instead go on the record to Superior Court. That is a very
17 different review from what the Board does.

18 If an agency has a SEPA appeal procedure, the agency is to provide for a consolidated
19 appeal of procedural issues and the substantive determination. RCW 43.21C.075(3). The
20 Shorelines Hearings Board has provided for review of both the underlying permit and the
21 SEPA determinations. WAC 461-08-175.

22 Ecology does not have to appeal the SEPA decision separately, within the internal city
23 process. See RCW 43.21C.075(3). Rather, Ecology properly appealed the shoreline permit
24 and the SEPA determination together to this Board. RCW 43.21C.075(3). In so doing,
25 Ecology is properly exhausting its administrative remedies before this Board. See, Kitsap
County v. DNR, 99 Wn.2d 386, 391 (1983).

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2 In addition, it has not been demonstrated that Ecology failed to comment on the DNS.
3 To the contrary, Ecology raised several questions on wetland concerns and agriculture in tis
4 comment letter. See Ecology v. Bellingham, SHB No. 89-2.

5 Lastly, while Ecology may not have specifically raised the SEPA issue in its Notice of
6 Appeal filed with the SHB, this does not merit dismissal. Only the most basic notice pleading
7 is required. In shoreline cases, the Board expeditiously convenes a prehearing conference with
8 the parties to list and refine legal issues, and so forth. This conference is held long before the
9 hearing. As part of this process, Ecology did list the SEPA issues, and these were reflected in
10 the prehearing order which governs the proceedings. Respondents have notice of this issue
11 and no prejudice has been shown.

12 In sum, the Motion to Dismiss Ecology's SEPA claims should be denied.

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14 2. SAVE

15 To support dismissing SAVE's SEPA claims, movants contend that SAVE did not
16 comply with the Bothell Municipal Code requirements at BMC 20.02.250, when it did not
17 provide advance notice to the responsible city official prior to filing an appeal with the Board.
18 Movants do not contend there was harm to the city by such failure. Moreover, there is no
19 contention that SAVE did not otherwise utilize Bothell's SEPA appeal procedures.

20 There is no requirement in the Shoreline Management Act, its implementing
21 regulations, or the Board's procedural regulations that the appealing party has to provide
22 advance notice to the responsible city or county official when the SEPA decision is being
23 appealed. To the contrary, requiring such notice appears to conflict with the intent of the
24 SEPA statute itself, providing for combined appeals of SEPA and the underlying decision.
25 The Shoreline Management Act and the local SMP require appellants to notify the permitting
authority when they appeal, which they did. A requirement for separate advance notice of the

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2 SEPA appeal in the context of a shoreline appeal is a procedural trap for the unwary.

3 Moreover, no harm has been shown.

4 This Motion should also be denied.
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III. ORDER

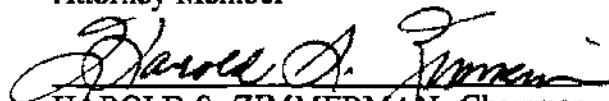
Respondents' Motions for Partial Summary Judgment are DENIED.

The trial on the merits is scheduled for November 16-19, 1992.


DATED this 18th day of March, 1992.

SHORELINES HEARINGS BOARD


JUDITH A. BENDOR, Presiding
Attorney Member


HAROLD S. ZIMMERMAN, Chairman


ANNETTE S. MCGEE, Member


NANCY BURNETT, Member


PETER HURLEY, Member


JUDITH BARBOUR, Member